BURTON/HAWKS, INC.

IBLA 89-415 Decided June 28, 1990

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, denying petitions for class I reinstatement of terminated oil and gas leases. WYW 97565, WYW 103425, and WYW 111657.

Affirmed.

1. Oil and Gas Leases: Reinstatement--Oil and Gas Leases: Termination

Pursuant to 30 U.S.C. § 188(b) (1982), when a lessee fails to pay the required rental on or before the anniversary date of a lease on which there is no well capable of producing oil or gas in paying quantities, the lease automatically terminates by operation of law. The Secretary may reinstate the lease, pursuant to 30 U.S.C. § 188(c) (1982), if the full rental is paid within 20 days of the lease anniversary date and the lessee can show that the failure to timely pay was either not due to a lack of reasonable diligence or was justifiable.

2. Accounts: Payments--Oil and Gas Leases: Reinstatement--Oil and Gas Leases: Termination

An unsigned check is not a negotiable instrument pursuant to the Uniform Commercial Code and where such a check is submitted to MMS in payment of the annual rental for an oil and gas lease such submission does not constitute timely payment within the meaning of 30 U.S.C. § 188(b) (1982). MMS has no affirmative obligation to attempt to negotiate an unsigned check since, by definition, such an unsigned check is not a negotiable instrument.

APPEARANCES: Bob Despain, Esq., Casper, Wyoming, for appellant.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Burton/Hawks, Inc., has appealed from a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated April 6, 1989, denying
petitions to reinstate three oil and gas leases which had terminated for failure pay the annual rental on or before the anniversary date of the leases pursuant to 30 U.S.C. § 188(b) (1982). We affirm. 1/

The relevant facts are not in dispute. Competitive oil and gas lease W-97565 issued to appellant on January 6, 1986, with an effective date of February 1, 1986. On January 9, 1986, competitive lease W-97658 issued to Rodeo Oil Company, also with an effective date of February 1, 1986. Thereafter, on July 18, 1988, BLM approved a partial assignment of 280 acres of that lease to appellant, effective April 1, 1988. The assigned acreage was given new serial number W-111657. Noncompetitive oil and gas lease W-103425 was issued on January 27, 1987, effective February 1, 1987, to Frank G. Wells, who assigned it to Paradox Basin Minerals Company, who in turn assigned it to appellant, effective July 1, 1988. As can be readily noted from the foregoing, all three leases bore a February 1 anniversary date.

On January 28, 1989, Minerals Management Service (MMS) received three unsigned checks covering the annual rental for these three leases. On February 2, 1989, these checks were returned to appellant, who thereupon signed the checks and resubmitted them on February 7, 1989. By Notices dated February 16 and March 3, BLM informed appellant that the leases at issue had terminated for failure to timely pay the annual rentals. These Notices informed appellant that, pursuant to 30 U.S.C. § 188(c) (1982), it had 60 days in which to petition for reinstatement of the leases.

On March 13, 1989, appellant submitted a petition seeking reinstatement of the leases under class I. 2/ Appellant admitted that the checks had not been signed but argued that justifiable reasons existed for this oversight. As explained by appellant, the rental checks in question had been prepared by the responsible clerk but were not transmitted to the Vice President for signature as he was out of the office on that day. The rental clerk then took maternity leave, having left instructions that the rental checks should be mailed out. The accounting clerk, however, failed to notice that the checks had not been signed when she mailed them. As a result, the checks which MMS received were not signed as they should have been. Appellant requested that the leases be reinstated under class I.

1/ By letter received Apr. 16, 1990, appellant requested that the Board expedite consideration of the instant appeal since two of the three leases involved would expire, by their own terms, on Jan. 31, 1991. In light of this showing, the Board accelerated consideration of this appeal.

2/ Although expressly advised of the availability of class II reinstatement relief under 30 U.S.C. § 188(d) (1982), which permits reinstatement of leases where the failure to timely pay was the result of inadvertence, appellant chose not to apply thereunder. That avenue is no longer open to appellant. See, e.g., Torao Neishi, 102 IBLA 49 (1988); John Clifton, 82 IBLA 126 (1984).

By decision dated April 6, 1989, the State Office rejected appellant's petition for reinstatement, finding that appellant had not exercised reasonable diligence nor had it shown that its failure to do so was justifiable. Specifically, the State Office noted that this Board had repeatedly held that mere inadvertence or negligence of a lessee's employees provides an insufficient basis on which to predicate reinstatement of a terminated lease under class I, citing, inter alia, Petrolero Corp., 60 IBLA 21 (1981); Fuel Resources Development Co., 43 IBLA 19 (1979); and Serio Exploration Co., 26 IBLA 106 (1976). This appeal followed.

[1] Under the applicable provisions of 30 U.S.C. § 188(c) (1982), an oil and gas lease which has terminated by operation of law for failure to submit the annual rental on or before the anniversary date of the lease may be reinstated under class I if the failure to timely pay was not due to a lack of reasonable diligence or if the failure to exercise reasonable diligence was justifiable.

In applying this dual standard, the Board has consistently stressed that the reasonable diligence test is an objective standard. An individual has exercised reasonable diligence if, considering the normal delays in the transmittal of mail, the payment was sent in sufficient time to reach its required destination on or before the anniversary date of the lease. See, e.g., Torao Neishi, supra; Melvin P. Clarke, 90 IBLA 95 (1985); Louis Samuel, 8 IBLA 268 (1972).

The justifiable test, on the other hand, is a subjective test. Thus, the Department has held that where circumstances have arisen beyond a lessee's control which prevented the exercise of reasonable diligence, the failure of the lessee to exercise the required diligence may be deemed justifiable. See, e.g., George Foster, 109 IBLA 82 (1989); NP Energy Corp., 72 IBLA 34 (1983); Louis Samuel, supra. We note that the Department's bifurcated analysis of this reinstatement provision has received judicial approbation. See Ramoco, Inc. v. Andrus, 649 F.2d 814 (10th Cir. 1981), cert. denied, 454 U.S. 1032; Ram Petroleums, Inc. v. Andrus, 658 F.2d 1349 (9th Cir. 1981). Therefore, in order for an appellant to prevail in an appeal from a denial of reinstatement of a terminated lease, it must show either that reasonable diligence was exercised or that the failure to exercise reasonable diligence was justifiable.

On appeal to this Board, appellant has abandoned its prior argument that the circumstances surrounding the drawing of the check established that its failure to exercise reasonable diligence was justifiable. Rather, it now argues that it made a timely payment and that MMS should have presented the unsigned checks to the bank so as to permit the bank an opportunity to honor the checks. Appellant advises the Board that it is informed that this is the procedure which BLM utilizes. In support of this argument, appellant has submitted an affidavit from the Executive Vice President of the First Interstate Bank of Casper attesting that had MMS attempted to negotiate the unsigned checks, he would have contacted appellant's President and paid the checks upon his approval.

[2] Regardless of whether or not BLM does, in fact, proffer unsigned checks for payment, 3/ it is clear that there is no obligation on the part of MMS to do so. In Susan Dawson, 35 IBLA 123 (1978), an oil and gas lease offeror had submitted a check in which the written amount disagreed with the figure amount. Rather than attempting to negotiate this check, BLM returned it to appellant and ultimately rejected the offer because of a failure to timely pay the first year's rental. This Board affirmed and, on appeal to the U.S. Court of Appeals for the Tenth Circuit, that Court expressly held that BLM had no obligation to present the check to the bank in order to see if the bank might pay the correct amount. Dawson v. Andrus, 612 F.2d 1280, 1282 (1980). See also Bertram F. Rudolph, 39 IBLA 167 (1979).

In the instant case, the checks which appellant tendered were unsigned. As such, they were not negotiable instruments (see Uniform Commercial Code § 3-104) and could give rise to no obligation on the part of MMS to attempt to negotiate them. The return of these checks by MMS to appellant was fully justified. The fact that the unsigned checks were timely received does not constitute timely payment of the annual rentals, since receipt of a non-acceptable remittance does not meet the statutory requirement of timely payment. Cf. James S. Guleke, 9 IBLA 73 (1973) (timely tender of rental by means of a check which, when presented, is dishonored by the bank on which it is drawn does not constitute timely payment). The only acceptable payment was the one received on February 7 and since this was not transmitted until after the anniversary date it is clear that reasonable diligence has not been shown. See, e.g., Ann L. Rose, 92 IBLA 308 (1986); Nancy Wohl, 91 IBLA 327 (1986).

Appellant also argues that it has discovered that MMS has, in the past, notified lessees by telephone that checks have been received unsigned. Appellant argues that this disparate treatment has prejudiced it.

We have no way of knowing if MMS has, in specific cases in the past, phoned lessees to alert them that a check has been unsigned. It seems clear, however, that if such eventualities have occurred, they have been isolated instances. Thus, appellant expressly notes that the MMS policy is to return unsigned checks. There is no indication that there is an MMS policy to phone lessees to inform them that their checks were unsigned and are being returned. In any event, as the Ninth Circuit noted in Ram Petroleums, Inc. v. Andrus, supra, in rejecting an argument that the Secretary had abused the discretion afforded him under the reinstatement provisions of the Mineral Leasing Act, "To find that the rules have been abused requires more than a showing of several perhaps aberrational

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3/ Assuming that appellant is correct in its assertion that the Wyoming State Office does forward unsigned checks for payment, it is at least open to question whether such action comports with the BLM Manual. Thus, while the Manual notes that in certain circumstances such as oil and gas rental payments, "questionable" checks should be accepted subject to payment, it also notes that, generally, unsigned checks "are uncollectible or not acceptable." See BLM Manual 1372.32B.

instances of its exercise." Id. at 1354. So, too, in the instant case,
absent a minimal evidentiary showing that employees of MMS failed to telephone appellant out of male fides, the assertion that employees of MMS have, on occasions in the past, telephoned other lessees to alert them to the fact that their remittances were unsigned does not give rise to a cognizable claim of disparate treatment. 4/

Finally, appellant argues that the fact that MMS has retained the rental payments during the pendency of the appeal evidences acceptance of the late rental payments. Appellant is in error. Payment of the annual rental payments is a prerequisite to consideration of its petition for reinstatement under class I. Acceptance of such remittances, pending adjudication of appellant's petition for reinstatement, does not constitute a tacit or express waiver of the late filing. See Rose L. Terenzi, 68 IBLA 21 (1982). When the decision rejecting its petition for reconsideration is final, the tendered payments will be refunded in due course.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

James L. Burski
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge

4/ Certainly, appellant can premise no claim of detrimental reliance on the actions of MMS. Appellant was not even aware of any policy of MMS with respect to the handling of unsigned checks until after the events in question had transpired. Moreover, since the failure of appellant's Vice-President to sign the checks was clearly inadvertent, the existence of a policy of telephonic notification could not have been a causative factor in the submission of the unsigned checks. They were submitted unsigned not because appellant thought that MMS would afford it an opportunity to correct the submission, but rather through simple oversight. As District Judge Pratt noted in a similar context in Reichhold Energy Corp. v. Andrus, Civ. No. 79-1274 (D.D.C. Apr. 30, 1980), "[P]laintiff made * * * mistakes in a business that has exacting requirements and as a consequence plaintiff has been penalized. We will not permit the plaintiff to shift the blame for its troubles to the Secretary of the Interior."